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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 TEODOSO SERRANO MORENO,

12 Plaintiff,

13 vs.

14 MICHAEL J. ASTRUE, Officially as  
Commissioner of Social Security  
Administration,

15 Defendant.

CASE NO. 08cv1022-WQH-PCL

**ORDER**

16 HAYES, Judge:

17 The matter before the court is the review of the Report and Recommendation (Doc. #  
18 21) issued by United States Magistrate Judge Peter C. Lewis, recommending that Plaintiff's  
19 Motion for Motion for Summary Judgment (Doc. # 12) be denied and Defendant's Cross-  
20 Motion for Summary Judgment (Doc. # 15) be granted.

21 **BACKGROUND**

22 On November 28, 2005, Plaintiff protectively filed an application for Supplemental  
23 Security Income ("SSI"), alleging he was suffering from schizophrenia and unable to work.  
24 (Administrative Record, Doc. # 10 ("AR"), 24-26). The Social Security Administration denied  
25 Plaintiff's application for SSI initially on March 26, 2006 and upon reconsideration on  
26 December 4, 2006. (AR 24-36).

27 On December 26, 2006, Plaintiff requested a hearing before an Administrative Law  
28 Judge ("ALJ"). (AR 37). On April 24, 2007, Plaintiff appeared and testified at the hearing

1 before the ALJ. (AR 13, 225-77). Also appearing and testifying were Sidney Bolter, M.D.,  
 2 an impartial medical expert (AR 248-73); Mark Remas, an impartial vocational expert (AR  
 3 273-77); and Florida Hernandez, Plaintiff's sister (AR 237-43).

4 On September 26, 2007, the ALJ denied Plaintiff's application for SSI in a written  
 5 decision. (AR 13-23).

6 On November 28, 2007, Plaintiff filed a request for review of the ALJ's decision. (AR  
 7 9). On April 7, 2008, the Appeals Council denied Plaintiff's request for review, rendering the  
 8 decision of the ALJ final. (AR 4-9).

9 On June 6, 2008, Plaintiff commenced this action for judicial review pursuant to 42  
 10 U.S.C. 405(g).<sup>1</sup> (Doc. # 1). On March 26, 2009, after the parties filed cross-motions for  
 11 summary judgment, the Magistrate Judge issued a Report and Recommendation recommending  
 12 that the Court deny Plaintiff's Motion for Summary Judgment and grant Defendant's Motion  
 13 for Summary Judgment. (Doc. # 21).

14 On April 17, 2009, Plaintiff filed objections to the Report and Recommendation. (Doc.  
 15 # 22). On April 27, 2009, Defendant filed a reply to Plaintiff's objections. (Doc. # 23).

### 16 STANDARD OF REVIEW

17 The duties of the district court in connection with the Report and Recommendation of  
 18 a Magistrate Judge are set forth in Federal Rule of Civil Procedure 72(b) and 28 U.S.C. §  
 19 636(b). The district judge must "make a de novo determination of those portions of the report  
 20 ... to which objection is made," and "may accept, reject, or modify, in whole or in part, the  
 21 findings or recommendations made by the magistrate." 28 U.S.C. § 636(b). The district court  
 22 need not review de novo those portions of a Report and Recommendation to which neither  
 23 party objects. *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005); *U.S. v.*  
 24 *Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003) (en banc).

25 The ALJ's decision denying benefits "will be disturbed only if that decision is not  
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27 <sup>1</sup> On October 30, 2007, Plaintiff reapplied for SSI. (Doc. # 12 at 6). This application  
 28 was approved by the Social Security Administration on April 2, 2008. (Doc. # 12 at 7). At  
 issue in this appeal is a closed period of benefits from November 28, 2005 through October  
 30, 2007. (Doc. # 12 at 7).

1 supported by substantial evidence or it is based upon legal error.” *Tidwell v. Apfel*, 161 F.3d  
 2 599, 601 (9th Cir. 1999) (citation omitted). “Substantial evidence is more than a mere scintilla  
 3 but less than a preponderance.” *Id.* (citation omitted).

#### 4 DISCUSSION

5 Plaintiff objects to the Magistrate Judge’s findings that: (1) the ALJ sufficiently  
 6 considered the lay testimony of Plaintiff’s sister, and (2) the ALJ properly discounted the Mini-  
 7 Mental Status Examination and Psychiatric Review Form opinions rendered by Plaintiff’s  
 8 treating psychiatrist.

#### 9 I. Testimony of Plaintiff’s Sister

10 Plaintiff contends that the ALJ “failed to consider and comment on Florida Hernandez’s  
 11 testimony regarding Mr. Moreno’s ability to work which is competent evidence.” (Doc. # 22  
 12 at 2).

13 “In determining whether a claimant is disabled, an ALJ must consider lay witness  
 14 testimony concerning a claimant’s ability to work.” *Stout v. Comm’r of Soc. Sec. Admin.*, 454  
 15 F.3d 1050, 1053 (9th Cir. 2006) (citation omitted). An ALJ must give reasons for discounting  
 16 this type of evidence and cannot disregard it without comment. *See Nguyen v. Chater*, 100  
 17 F.3d 1462, 1467 (9th Cir. 1996). “[I]f the ALJ wishes to discount the testimony of lay  
 18 witnesses, he must give reasons that are germane to each witness.” *Stout*, 454 F.3d at 1053  
 19 (quotation omitted). “However, in interpreting the evidence and developing the record, the  
 20 ALJ does not need to discuss every piece of evidence.” *Howard ex rel. Wolff v. Barnhart*, 341  
 21 F.3d 1006, 1012 (9th Cir. 2003) (quotation omitted).

22 Plaintiff’s sister, Florida Hernandez, submitted two third-party “Function Reports,”  
 23 provided information to Plaintiff’s treating psychiatrist, and testified at the hearing before the  
 24 ALJ. (AR 21, 71-86, 237-43). In the first Function Report, dated December 19, 2005,  
 25 Hernandez stated that Plaintiff slept all the time; that he always needed to be told to attend to  
 26 his personal hygiene; that he did not prepare his own meals and had no interest in eating; that  
 27 he had to be told to do housework; and that he got extremely anxious when he went outside  
 28 or had control over money. (AR 71-78). In the second Function Report, dated June 6, 2006,

1 Hernandez stated that she constantly needed to tell Plaintiff when tend to his hygiene, eat and  
2 take his medicine; that he did not do any housework; that he locked himself in his room and  
3 slept all day; that he had no interest in anything; that he was unable to handle money; that he  
4 was very withdrawn; that he had a hard time concentrating; that he was constantly crying; and  
5 that he said that he felt like dying. (AR 79-85).

6 In a progress note dated December 8, 2006, Plaintiff's psychiatrist, Dr. Bucardo made  
7 the following notation:

8 Sister reports that patient observes partial compliance with meds and continues  
9 to isolate and practically never leaves his room. Patient has been unable to  
10 obtain/maintain employment. He is constantly looking over his shoulder,  
distrusts most people he comes into contact with and has episodic agitation and  
AH with commands.

11 (AR 212). In a progress note dated February 9, 2007, Dr. Bucardo wrote: "Sister reports that  
12 patient observes partial compliance with meds. Patient has been unable to obtain/maintain  
13 employment. He is constantly looking over his shoulder, distrusts most people he comes into  
14 contact with and has episodic agitation and AH with commands." (AR 211).

15 At the April 24, 2007 hearing, Hernandez testified that when Plaintiff "got sick," he  
16 would lock himself in his room, would be afraid to come out, would sleep during the day,  
17 would barely eat, and would have to be told to clean himself, shave, and change his clothes.  
18 (AR 242-43). Hernandez also testified that on one occasion in 2006, Plaintiff went to Mexico  
19 by himself and "he took too much medication or whatever the problem was so then they had  
20 to take him to ... his older doctor." (AR 240).

21 The ALJ does not reference Hernandez's testimony or Function Reports, but she does  
22 reference Hernandez's statements in the two progress notes. (AR 21). The ALJ states: on  
23 December 8, 2006, "[t]he claimant's sister reported that the claimant was only partially  
24 compliant with his medications, was isolating himself, and had been unable to obtain a job, and  
25 was currently looking over his shoulder"; and "[o]n February 9, 2007, the claimant's sister  
26 again reported that the claimant was only partially compliant with treatment." (AR 21).

27 In the Report and Recommendation, the Magistrate Judge states:

28 In her opinion, the ALJ did not refer to all of the statements made by Ms.  
Hernandez but did consider those significant and probative: that Plaintiff was

1 only partially compliant with medication; that he isolated himself; that he was  
 2 unable to obtain a job; and that he was paranoid. Although the ALJ did not  
 3 question the credibility of Ms. Hernandez's statements, she did use evidence  
 4 provided by Ms. Hernandez—namely Plaintiff's paranoia, his noncompliance  
 with medication and treatment regimens, and his inability to obtain a job—to  
 bolster her finding that Plaintiff was not disabled because he could have had the  
 ability to work had he properly and consistently taken his medications.

5 (Doc. # 21 at 12 (footnote omitted) (citing *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d  
 6 1001, 1006 (9th Cir. 2006) (finding that impairments that can be effectively controlled with  
 7 medication are not disabling for purposes of determining eligibility for Social Security  
 8 benefits)).

9 Plaintiff objects to the "ALJ's mere recital of a minor fraction of Ms. Hernandez's  
 10 testimony," and contends that "even if the ALJ accepted in part and discounted in part Ms.  
 11 Hernandez's testimony, she was required to give reasons that are germane to Ms. Hernandez  
 12 for discounting her testimony regarding Mr. Moreno's ability to work." (Doc. # 22 at 2).

13 After reviewing the ALJ's decision and the Administrative Record de novo, the Court  
 14 finds that the ALJ considered the significant and probative aspects of Hernandez's statements.  
 15 *Cf. Vincent on Behalf of Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) ("The  
 16 Secretary ... need not discuss all evidence presented to her. Rather, she must explain why  
 17 significant probative evidence has been rejected.") (quotation omitted). The Magistrate Judge  
 18 properly concluded that the ALJ did not reject Hernandez's testimony. (Doc. # 21 at 12). The  
 19 ALJ used Hernandez's evidence to support the ALJ's finding that Plaintiff was not disabled  
 20 because he could have had the ability to work had he properly and consistently taken his  
 21 medications. (AR 18, 21). None of Hernandez's statements were inconsistent with this  
 22 conclusion.

## 23 **II. Mini-Mental Status Examination and Psychiatric Review Form**

24 Plaintiff objects to the Magistrate Judge's findings regarding the Mini-Mental Status  
 25 Examination and Psychiatric Review Form opinions rendered by Dr. Bucardo. (Doc. # 22 at  
 26 3-5). Plaintiff contends that the Magistrate Judge erred by: (a) finding that the ALJ properly  
 27 discounted the opinions because they were obtained for advocative purposes and were not  
 28 supported by Dr. Bucardo's treatment notes; and (b) finding that the Psychiatric Review Form

1 is a fraudulent document.

2 **A. Advocative Purposes and Lack of Support**

3 In the Mini-Mental Status Examination and the Psychiatric Review Form, Dr. Burcado  
4 found that Plaintiff had schizophrenia, a global functioning score of 37, and would experience  
5 four or more repeated episodes of decompensation, each of extended duration. (AR 208-10,  
6 215-18).

7 The ALJ stated that the Mini-Mental Status Examination and Psychiatric Review Form  
8 were completed for the purpose of “obtaining supportive documentation,” so “the claimant  
9 could obtain financial aid from the country and not have to work,” and to “exempt[] the  
10 claimant from being tested in connection with his application for citizenship.” (AR 21). The  
11 ALJ stated that “Dr. Bucardo’s findings provide little objective evidence to support his  
12 comments regarding the claimant’s cognitive impairments, indicated in the psychiatric review  
13 form.... The undersigned finds that Dr. Bucardo was actively assisting the claimant’s attempt  
14 to obtain benefits, rather than simply treating the claimant, in that he was undoubtedly aware  
15 that the claimant wanted to become a citizen.” (AR 21).

16 After reviewing the ALJ’s decision and the Administrative Record de novo, the Court  
17 finds that the ALJ acted within her discretion in discounting the Mini-Mental Status  
18 Examination and the Psychiatric Review Form. Dr. Bucardo’s March 22, 2007 progress notes  
19 reflect that Dr. Bucardo examined Plaintiff “for medical report for INS form.” (AR 208). The  
20 ALJ properly reviewed and summarized Dr. Bucardo’s prior treatment notes, and the ALJ  
21 found the Mini-Mental Status Examination and the Psychiatric Review Form to be inconsistent  
22 with those prior notes. (AR 18-21). The ALJ provided specific and legitimate reasons to  
23 discount the findings and conclusions of the Mini-Mental Status Examination and the  
24 Psychiatric Review Form, and that decision is supported by substantial evidence. *See Saelee*  
25 *v. Chater*, 94 F.3d 520, 522-23 (9th Cir. 1996) (holding that an ALJ has the discretion to find  
26 a treating doctor’s opinion to be untrustworthy because it was obtained for advocative purposes  
27 and because it varies from the doctor’s own treatment notes); *see also Bayliss v. Barnhart*, 427  
28 F.3d 1211, 1216 (9th Cir. 2005) (“[A]n ALJ may only reject [a treating doctor’s opinion] by

1 providing specific and legitimate reasons that are supported by substantial evidence.”)(citation  
2 omitted).

### 3 **B. “Fraudulent Document”**

4 When the discussing the Psychiatric Review Form, the ALJ stated:

5 Although this form appears to be signed by Dr. Bucardo, aside from the date, few of the  
6 comments on the form are written by him. In another hand are comments by an  
7 unidentified person. They include: ‘claimant suffers from chronic paranoid  
8 schizophrenia with significant cognitive impairment...’ It is interesting to note that Dr.  
Bucardo’s diagnosis has been psychosis, not otherwise specified, throughout, and not  
chronic paranoid schizophrenia.

9 (AR 21).

10 Referencing this language, the Magistrate Judge stated: “[T]he ALJ noted that it was  
11 questionable whether the psychiatric review form was actually signed by Dr. Bucardo and that  
12 few of the comments on the form were made by him. The ambiguity and indications of fraud  
13 evidenced in the document were another legitimate reason for the ALJ to reject it outright.”  
14 (Doc. # 21 at p.15 line 28 - p.16 line 3). The Magistrate Judge also stated in a footnote: “Upon  
15 reviewing the form, the undersigned believes that the psychiatric review form is a fraudulent  
16 document. It does not appear to be signed and dated by Dr. Bucardo, and there are multiple  
17 different handwritings on the document.” (Doc. # 21 at 16 n.3).

18 Plaintiff objects to this language from the Report and Recommendation on the grounds  
19 that it misstates the ALJ’s findings. Pursuant to 28 U.S.C. § 636(b), the Court will not adopt  
20 the following lines from the Report and Recommendation: page 15, line 28 through page 16,  
21 line 3, and page 16, footnote 3. (Doc. # 21 at 15-16).

22 The Court finds that this error by the Magistrate Judge is harmless. The ALJ provided  
23 specific and legitimate reasons to discount the findings and conclusions of the Mini-Mental  
24 Status Examination and the Psychiatric Review Form, and that decision is supported by  
25 substantial evidence. *See Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th Cir. 2006)  
26 (holding that error which is inconsequential to the ultimate nondisability determination is  
27 harmless error).

### 28 **CONCLUSION**

After reviewing de novo those portions of the Report and Recommendation to which




1 Plaintiff objected, and after generally reviewing the Report and Recommendation and the  
2 ALJ's decision in light of the Administrative Record, the Court finds that the Magistrate Judge  
3 correctly evaluated the facts and applied the controlling law in this case.

4 Accordingly, **IT IS HEREBY ORDERED** that: (1) the Court **ADOPTS** all portions  
5 of the Report and Recommendation (Doc. # 21) except for page 15, line 28 through page 16,  
6 line 3, and page 16, footnote 3; (2) Plaintiff's Motion for Summary Judgment (Doc. # 12) is  
7 **DENIED**; and (3) Defendant's Cross-Motion for Summary Judgment (Doc. # 15) is  
8 **GRANTED**.

9 The Clerk shall enter judgment for Defendant and against Plaintiff.

10 DATED: July 17, 2009

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12 **WILLIAM Q. HAYES**  
13 United States District Judge  
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